

LEGAL UPDATES

Executive Orders and Their Limits – What Businesses Need To Know

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An Executive Order is a signed, published directive issued by the President of the United States to manage operations within the federal government. These orders guide the actions of government officials and agencies, but do not create new laws or override existing federal statutes.

They can, however, have a direct or indirect impact on the ongoing business functions or compliance obligations of both private and public organizations. With over 100 Executive Orders issued since January 20, it is important to understand with these orders may mean – or not mean – for your business’s day-to-day operations.

Executive Orders – Direction Not Legislation

Unlike legislation, Executive Orders (EOs) do not carry the force of federal law, but they do create directives that must be followed by federal agencies and, sometimes, those who interact with them. While presidents cannot use an Executive Order to enact a new statute or law, EOs can direct federal agencies on how to implement existing laws. For example, Congress can declare a certain class of drugs legal or illegal. An EO, drawing on that law, can direct the Department of Justice to prosecute certain drugs under that law and refrain from prosecuting others.

[Executive Orders and executive actions are stylistically different but have very similar effects. Our [March 13 overview](#) outlines the differences between EOs and other sources of federal regulatory power.]

Enforcement of Executive Orders

- **Within Federal Agencies** —Executive Orders can direct agencies on how to interpret and enforce existing statutes or regulations. For example, an order may prioritize certain enforcement actions or require agencies to issue new

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rules within their authority. However, agencies must still comply with administrative law principles, such as notice-and-comment rulemaking under the Administrative Procedure Act (APA), when implementing policy changes.

- **Outside Federal Agencies** — The president cannot unilaterally impose legal obligations on private parties through an Executive Order. However, orders can indirectly affect businesses and individuals when the orders apply to government contractor rules, federal funding rules or federal regulations affecting certain industries. For example, an EO may require federal contractors to comply with specific labor standards as a condition of receiving government contracts.

Implications for Businesses and Organizations

Executive Orders can have significant regulatory and compliance implications for businesses. While they do not impose direct legal requirements on private entities, they can shape enforcement priorities, government contracting rules and agency decision-making. Businesses operating in heavily regulated industries should closely monitor executive actions that may impact their compliance obligations.

Limitations On and Challenges To Executive Orders

Although Executive Orders are a powerful tool for any U.S. president, they are limited by and remain subject to constitutional checks and balances. For example, an EO must be grounded in existing constitutional or statutory authority. A president's EO cannot create new laws or impose wholly new obligations without congressional approval.

Courts have the last word on whether Executive Orders are a valid exercise of power – courts may invalidate EOs that exceed presidential authority, violate the Constitution or conflict with existing laws. [We are tracking all ongoing legal challenges to the current administration's Executive Orders; see our [Litigation Tracker](#) [here](#).]

In addition, Congress can limit or override the effects of an Executive Order by passing legislation that modifies or restricts the president's directives – for example, by attempting to withhold spending on programs created by an EO.

A landmark case illustrating the limits of executive power is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Amid the Korean War, President Harry Truman issued an Executive Order seizing control of steel mills to prevent a labor strike from disrupting steel production. The U.S. Supreme Court ruled that Truman's order was unconstitutional because he lacked both explicit and implied authority to seize private property without congressional approval. Writing for the majority, Justice Hugo Black reaffirmed the separation of powers, stating, "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

A more recent example involves President Biden's attempt to cancel student loan debt through executive action. In 2022, the administration announced a plan to forgive up to \$20,000 in federal student loans per borrower, citing the HEROES Act as its legal basis. However, in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), the U.S. Supreme Court ruled that the statute did not grant the Department of Education such broad authority. The administration then introduced a narrower loan relief plan, but a federal appeals court recently blocked that initiative as well, reinforcing the principle that Executive Orders must be rooted in clear congressional authorization.

In contrast, the U.S. Court of Appeals for the D.C. Circuit upheld an Executive Order issued by President Clinton barring federal contracts with companies that permanently replaced striking workers in *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). The order was challenged by the U.S. Chamber of Commerce, which argued that it was preempted by the National Labor Relations Act (NLRA) and that the president lacked authority to impose such a restriction on federal contractors. The court upheld the president's Executive Order, finding it properly rooted in the Federal Property

and Administrative Services Act (FPASA) to establish contracting conditions that promote efficiency and cost savings. It also emphasized that the government, acting as a market participant, has the right to choose with whom it contracts, so long as the order does not directly conflict with existing law. Because the order applied only to federal contractors and did not impose new legal penalties on private employers, it was not preempted by the NLRA. This case highlights how EOs are more likely to withstand legal challenges when they are based on clear statutory authority and pertain to government contracting rather than general business regulation.

Congress's Challenge in Overturning Executive Orders

While Congress has the power to overrule an Executive Order with new legislation, it can be difficult to do so. In many cases, EOs reflect the president's policy priorities, and overcoming them may require significant political effort, particularly when the president's party holds a majority. Assuming a congressional majority is reached to pass a law overriding an EO, the president still holds veto power over that legislation. A presidential veto can only be overcome by a two-thirds majority in both houses of Congress. Members of Congress can turn to courts for relief (although standing can present a problem), but as noted above, EOs within the president's constitutional or statutory authority that do *not* contradict an act of Congress are often upheld by courts.

Challenges Presented by Unclear Executive Orders

When Executive Orders are loosely worded or lack clear statutory authority, they can lead to confusion and legal uncertainty until clarified by the courts. In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), for example, the U.S. Supreme Court struck down an EO delegating broad authority to the president to regulate oil shipments because it was too vague and lacked clear standards for enforcement, violating the nondelegation doctrine. The court ruled that the president could not issue such a broad directive without specific guidelines from Congress.

National Association of Manufacturers v. Department of Defense, 583 U.S. 109 (2018), illustrates a related problem with Executive Orders that lack clarity either in their scope, their source of power or their reach. *National* analyzed an EO related to the Waters of the United States (WOTUS) rule under the Clean Water Act, which directed the Environmental Protection Agency (EPA) and the Army Corps of Engineers to reconsider and potentially rescind a 2015 WOTUS rule expanding jurisdiction. For the next five years, a lack of clarity led to federal agencies issuing conflicting guidance, states applying different interpretations, and businesses facing uncertainty as to which rules applied to them. In 2018, the U.S. Supreme Court declined to rule on the legality of WOTUS itself, but did rule that challenges had to be heard in federal district courts, delaying legal resolution further. Thus, confusion persisted until 2020, when the Trump administration formally repealed the 2015 WOTUS rule and replaced it with the Navigable Waters Protection Rule (NWPR), significantly narrowing federal water regulations.

The repeal and replacement were challenged, but the Trump administration's use of formal administrative rulemaking under the APA made the repeal legally viable, distinguishing it from an Executive Order alone, which was not sufficient to overturn WOTUS. The Biden administration later attempted to restore broader protections, but the Supreme Court's *Sackett v. EPA*, 598 U.S. 651 (2023), ruling further restricted federal jurisdiction over wetlands. *National* and its aftermath stand as an illustration of the confusion and difficulty that businesses and agencies can face when EOs lack precision or clarity.



Why This Matters

Executive Orders serve as an important mechanism for directing federal agencies and shaping policy within the bounds of existing law, but they are not a substitute for legislation. Understanding the scope, limitations and potential impact of EOs is essential for businesses and individuals navigating federal regulations.

If you have any questions about how Executive Orders may affect your business or compliance obligations, please contact [Allonn Levy](#) or [Fiona Madden](#), or your regular Lathrop GPM attorney, for further guidance.